

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOHN PINKOSKI, SR., et al.,

Plaintiffs,

-vs-

County of Monroe, et al.,

Defendants.

**12-CV-6358-MAT
DECISION AND ORDER**

I. Introduction

Plaintiffs John Pinkoski, Sr., John Pinkoski, Jr., Mary Wozniak and Jeff Pinkoski filed this action against defendants on July 2, 2016, asserting constitutional violations pursuant to 42 U.S.C. § 1983 and various state law claims. On July 20, 2016, Magistrate Judge Marian W. Payson issued a Report and Recommendation (Docket No. 44), familiarity with which is assumed, recommending that this action be dismissed, with prejudice, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure for plaintiff's failure to prosecute. Plaintiffs' objections, if any, were due fourteen (14) days after receipt of the Report and Recommendation. Twenty-one (21) days have elapsed since Judge Payson filed her Report and Recommendation, and the Court has not received any objections or a motion by plaintiffs for an extension of time. Prior to this, plaintiffs failed to appear for a status conference scheduled to be held by Judge Payson on May 17, 2016. Moreover, plaintiffs failed to respond to Judge Payson's subsequent order to show cause, dated May 20, 2016, why the action should not

be dismissed for their failure to prosecute. In the order to show cause, plaintiffs were expressly advised that their failure to respond to the order to show cause would result in Judge Payson's recommendation of dismissal of the action pursuant to Rule 41(b).

As discussed further below, the Court finds no clear error in Judge Payson's Report and Recommendation, and therefore adopts it in its entirety and orders that this action is dismissed with prejudice.

II. Discussion

When specific objections are made to a magistrate judge's report and recommendation, the district judge makes a "de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). When only general objections are made to a magistrate judge's report and recommendation, the district judge reviews it for clear error or manifest injustice. *E.g.*, *Brown v. Peters*, 1997 WL 599355, at *2-3 (N.D.N.Y. Sept. 22, 1997), *aff'd*, 175 F.3d 1007 (2d Cir. 1999). Similarly, when a party makes no objection to a portion of a report and recommendation, the district court reviews that portion for clear error or manifest injustice. *See, e.g.*, *Batista v. Walker*, 1995 WL 453299, at *1 (S.D.N.Y. 1995) (internal citations omitted); FED. R. CIV. P. 72(b), Advisory Committee Notes: 1983 Addition (citations omitted). After conducting the appropriate review, the district court may "accept,

reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b) (1) (C) .

Here, the Court has conducted a thorough review of the record, the Report and Recommendation, and the relevant legal authority. As noted above, plaintiffs have presented no objections to the Report and Recommendation. Therefore, the Court has reviewed the Report and Recommendation for clear error or manifest injustice only.

After reviewing the Report, the Court finds no such error or injustice. Rule 41(b) of the Federal Rules of Civil Procedure provides, in relevant part, that an action by a plaintiff who fails to prosecute is subject to dismissal. See Fed. R. Civ. P. 41(b) . As Judge Payson has pointed out, the record reveals that plaintiff’s last communication with the Court, requesting the appointment of counsel by letter dated December 29, 2015, was received on January 4, 2016. As described above, the plaintiffs have taken no action since that date, and they failed to comply with Judge Payson’s January 5, 2016 directive to file a motion for the appointment of counsel. Based on a review of the record in this case, the Court agrees with Judge’s Payson’s finding that “plaintiffs’ actions demonstrate the level of prosecutive delinquency justifying dismissal.” Report and Recommendation, p. 4.

III. Conclusion

For the reasons set forth in Judge Payson's thorough and well-reasoned Report and Recommendation, the undersigned adopts all of her conclusions. The Report and Recommendation is hereby adopted in its entirety, and the complaint is dismissed with prejudice pursuant to Rule 41(b) of the Federal Rules of Civil Procedure for plaintiffs' failure to prosecute. The Clerk of the Court is requested to close this case.

IT IS SO ORDERED.

S/Michael A. Telesca

MICHAEL A. TELESCA
United States District Judge

Dated: August 10, 2016
Rochester, New York